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In the

Supreme Court of the United States

October Term, 1975

No. 75-1403

WILLIAM J. DIRK,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Two

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SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

TOPICAL INDEX

page

Opinion Below 2

Jurisdiction 2

Question Presented for Review 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 8

I.—Since this Court has already determined that evidentiary sufficiency in the F.E.L.A./Jones Act cases is to be tested by a federal standard, the decision of the California Court of Appeal, applying California's own "substantial evidence" rule of evidentiary sufficiency, is in direct and irreconcilable conflict with prior decisions of this Court. 8

Conclusion 16

APPENDICES

page

Opinion of the Court of Appeal of the State of California ..... Appendix A

Petition for Rehearing ..... Appendix B

Petition for Hearing ..... Appendix C

TABLE OF AUTHORITIES CITED

Cases

page

Cox v. Roth, 348 U.S. 297 (1955) 12

Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108, (1963) 9

Gibson v. Elgin, Joliet & Eastern Railway Co., (7th Cir. 1957) 246 F. 2d 834, cert. den. 355 U.S. 897 16

Lavender v. Kern, 327 U.S. 645 (1946) 16

Philadelphia & Reading Railroad Co. v. Polk, 256 U.S. 332 (1920) 12

Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500 (1957) 2, 6, 8, 12, 15

Sentilles v. Inter-Caribbean Shipping Co., 361 U.S. 107 (1959) 10

Statutes

28 U.S.C., Section 1257(3) 2

45 U.S.C., Section 51 3

46 U.S.C., Section 688 ..... 3, 4

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Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Two

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Two, entered in the above entitled case on December 2, 1975.

Opinion Below

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two is unreported and is printed in Appendix A herto, infra, pp. 1 through 13, inclusive.

Jurisdiction

The judgment of the Court of Appeal of the State of California, First Appellate District, Division Two (Appendix A) was entered on December 2, 1975. A timely petition for rehearing by that Court was denied on December 31, 1975 (Appendix B, infra) and thereafter a timely petition for a hearing in the Supreme Court of the State of California was denied on January 28, 1976 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

Question Presented for Review

Whether a state court in a Jones Act Case, in testing the sufficiency of the evidence to support a judgment in favor of the plaintiff seaman, is bound by the rule of evidentiary sufficiency enunciated by this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 (1957), and related subsequent decisions of this Court, or whether the state court may apply its own, more stringent standard of evidentiary sufficiency.

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Statutes Involved

The primary statutory provision involved is 46 U.S.C., Section 688, the Jones Act, which provides, in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. . . ."

By its terms, the Jones Act extends to seamen remedies made available to railroad workers under the Federal Employers Liability Act, 45 U.S.C., Section 51, which provides in pertinent part:

> "Every common carrier by railroad while engaged in . . . [interstate or foreign commerce] shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ."

Statement of the Case

In the proceeding below, petitioner, a merchant seaman, sought to recover, pursuant to the provisions of the Jones Act (46 U.S.C., Section 688 et seq.) and the general maritime law, damages for injuries sustained by him in the course of his employment aboard the respondent's vessel, the S. S. President Roosevelt, allegedly as the result of the respondent's negligence and the unseaworthy condition of the vessel. More specifically, petitioner contended that he had slipped while descending a vertical, metal ladder which connected the deck where petitioner's place of employment was located and the deck where the crew's quarters were located. Petitioner contended that this ladder was in a slippery, unsafe condition for three mutually independent reasons: (1) the embossed metallic tread of the ladder had been worn away to the point of invisibility, (2) the ship's officers had negligently failed to install anti-skid treads on the ladder, and (3) members of the ship's crew had negligently tracked oil from the deck below the ladder up onto the ladder treads.

Following a trial on the merits, in the Superior Court of the State of California, in and for the City and County of San Francisco, the jury rendered a verdict in favor of the petitioner and judgment was duly entered thereon. Respondent did not appeal from the judgment, but rather appealed to the Court of Appeal of the State of California, First Appellate District,

BLEED THROUGH

from the order of the trial court denying respondent's motions for a new trial and for judgment notwithstanding the verdict.

The order denying the motion for new trial was a non-appealable order, and the appeal therefrom was dismissed by the Court of Appeal (Appendix A, p. 6, footnote 1), and appellate review was restricted to a review of the order denying respondent's motion for judgment notwithstanding the verdict. Thus, the sole question presented for decision to the Court of Appeal related to the sufficiency of the evidence to support the verdict and judgment rendered below in favor of the petitioner.

The Court of Appeal expressly disdained to make any analysis of the evidence in terms of negligence or unseaworthiness and restricted its inquiry and analysis to the issue of *causation*. In its opinion, the Court of Appeal stated:

> ". . . in determining the sufficiency of the evidence in this case, the sole issue is whether the defendant's [sic] fall was the result of the unsafe condition of the ladder. If the evidence supports such a finding, defendant concedes that the verdict must be upheld on a theory of unseaworthiness and that it is irrelevant whether the jury also found that defendant was negligent. . . ." (Appendix A, p. 7).

The Court of Appeal indicated that in testing the evidentiary sufficiency in this case it was applying the California standard (Appendix A, p. 6, footnote

1). The Court observed that "a thorough review of the evidence fails to disclose any tenable theory upon which a jury could reasonably base a finding that plaintiff's fall was caused by the unsafe condition of the ladder on defendant's ship" (Appendix A, p. 8). The Court then held that the evidence was not sufficient to support the judgment in favor of the petitioner and reversed the judgment with directions to the trial court to enter judgment in favor of the respondent shipowner (Appendix A, p. 13).

Thereafter, petitioner filed a petition for a rehearing by the Court of Appeal, in which petitioner pointed out that in its evaluation of the evidentiary sufficiency, the Court of Appeal had improperly failed to follow the unique federal standard enunciated by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), by which standard evidentiary sufficiency is to be tested in Jones Act cases. Petitioner further pointed out that the record on appeal contained evidence which would have permitted a jury reasonably to infer that respondent's negligence had played "any part, however small" in causing petitioner's injuries, and that the evidence was thus sufficient under the applicable federal standard to support the judgment in petitioner's favor. On December 31, 1975, the petition for a rehearing was denied (Appendix B).

Petitioner then filed a petition for a hearing by the Supreme Court of the State of California, again urging that the Court of Appeal had erred in failing to acknowledge or follow the applicable federal standard in reviewing the evidentiary sufficiency in the case. On January 28, 1976, the petition for hearing was denied (Appendix C).

Reasons for Granting the Writ

I

Since this Court has already determined that evidentiary sufficiency in F.E.L.A./Jones Act Cases is to be tested by a federal standard, the decision of the California Court of Appeal, applying California's own "substantial evidence" rule of evidentiary sufficiency, is in direct and irreconcilable conflict with prior decisions of this Court.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, (1957), *supra*, this Court clearly articulated the standard by which evidentiary sufficiency in F.E.L.A./Jones Act Cases is to be measured:

> "Under . . . [the F.E.L.A.] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the

BLEED THROUGH

> jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in *part*' to its negligence." (352 U.S. 506-507, Emphasis by the Court.)

This Court has never departed from the *Rogers* Rule. *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, (1963) is illustrative of the broad parameters of that rule. In *Gallick*, plaintiff was walking along a stretch of the defendant railroad's right of way where, for years, there had been a pool of stagnant water, in and about which were dead and decayed rats and birds. Insects had been seen on, over and above this pool. While walking near the pool, the plaintiff experienced a bite on his left leg. He grasped the spot and crushed what appeared to be a large insect. The bite wound on the plaintiff's leg subsequently became infected, ultimately necessitating the amputation of both plaintiff's legs.

In response to special interrogatories, the jury in *Gallick* found that there was a proximate causal relationship between the stagnant water, the carrion and the plaintiff's present physical condition. The jury also found, however, it was *not* within the realm of reasonable probability or foreseeability of the defendant to appreciate this proximate causal relationship. The trial court entered judgment for the plaintiff. The State Court of Appeal reversed, holding that a directed verdict for the defendant should have been granted

because the evidence was insufficient to support a judgment in favor of the plaintiff. Specifically, the Court of Appeal found that there was no direct evidence that the unidentified insect came from the defendant's stagnant pool, i.e., evidence which would have negated the alternative *possibilities* that the insect had emanated from the putrid mouth of a nearby river, or from weeds or unsanitary places on property not owned or controlled by the railroad. The Court of Appeal therefore determined there was merely "a series of guesses and speculations . . . a chain of causation too tenuous . . . to support a conclusion of liability." Accordingly, the Court of Appeal reversed and directed entry of judgment for the defendant.

This Court reversed, holding that in directing entry of judgment for the defendant, the Court of Appeal had improperly invaded the function and province of the jury. Applying the *Rogers* Rule, the Court held that it was for the *jury* to determine whether employer negligence had played *any* role in producing the plaintiff's injuries.

The *Rogers* Rule, of course, applies with equal force and effect in Jones Act Cases. In *Sentilles v. Inter-Caribbean Shipping Company*, 361 U.S. 107 (1959), a Jones Act Case, the plaintiff was injured under the following circumstances: When the vessel encountered heavy seas, the plaintiff was pitched into the air and fell back to the deck, where, upon landing, a wave washed him a considerable distance along the deck.

BLEED THROUGH

Shortly after the accident, the plaintiff became ill and was hospitalized and treated for a serious case of tuberculosis. The plaintiff sought recovery from the defendant shipowner both under the Jones Act and under the general maritime law. The plaintiff's theory was that the shipboard accident had activated or aggravated a previously latent tubercular condition. On appeal from the verdict and judgment in favor of the plaintiff, the defendant shipowner contended solely that the evidence did not justify the jury's conclusion that the accident had caused the serious illness that followed it. The Court of Appeal agreed and reversed the judgment. The United States Supreme Court, however, reversed, holding that the Court of Appeal had applied an improper standard in testing the sufficiency of the evidence. The Supreme Court held that the jury, as the exclusive fact finding body, could properly have *inferred* that the aggravation of the tubercular condition was caused by the accident. The Court went on to hold that the jury's power to draw that inference was not impaired by (1) the failure of any medical witness to testify that the accident was in fact the cause of the aggravation, (2) the lack of medical unanimity as to the respective likelihood of the various potential causes of the aggravation, or (3) the fact that other potential causes of the aggravation were not conclusively negated by the proofs.

Although the *Rogers* Rule was clearly applicable to the present case, the California Court of Appeal failed to apply that rule, and applied instead California's "substantial evidence" test, the standard by which evidentiary sufficiency is evaluated in civil actions generally. This Court has noted, however, that there are valid reasons for placing F.E.L.A. and Jones Act Cases on a different footing from ordinary personal injury actions.

In *Rogers v. Missouri Pacific Railroad Co., supra,* this Court observed that these statutory negligence actions have special features which make them "significantly different" from the ordinary common-law negligence actions. Since railroad workers and merchant seamen are not protected by the workman's compensation statutes of the several states, these employees' *exclusive* remedy against their employers for work-related injuries is via the F.E.L.A., in the case of railroad workers, and the Jones Act/General Maritime Law in the case of merchant seamen. *Philadelphia & Reading Railroad Co. v. Polk,* 256 U.S. 332 (1920). These statutes are remedial in nature and humanitarian in their purposes and this Court, for these reasons, has consistently directed that they be afforded a liberal and expansive interpretation by the courts. *Cox v. Roth,* 348 U.S. 297 (1955). Nowhere is this liberality of interpretation more evident than in those cases involving evidentiary sufficiency on the issue of proximate causation.

If one were to employ a "substantial evidence" rule such as California's, to test the evidentiary sufficiency in *Rogers*, *Gallick*, and *Sentilles*, it is clear that no recovery by any of those plaintiffs could ever have been upheld (and in fact in each of those cases lower courts *had* concluded that the evidence was insufficient). This Court, however, has made it abundantly clear in *Rogers* and in subsequent related decisions, that the states are not at liberty to apply their own standards of evidentiary sufficiency in F.E.L.A./Jones Act Cases, but rather must apply the more liberal and expansive *Rogers* Rule.

Had the California Court of Appeal applied that rule in its analysis of the instant case, as it was bound to do, it would have been required to affirm the judgment in favor of the petitioner below. Although there were conflicts in the evidence, as there inevitably are, the following evidence was adduced at trial:

1. The diamond safety tread on this metallic ladder had been worn away to the point that it could hardly be seen (Reporter's Transcript, p. 101).

2. Although the subject of placing anti-skid treads on this ladder had been brought up repeatedly at safety meetings held aboard the vessel, which meetings were attended by the ship's officers, and although the ship's officers had promised to install such treads, the officers failed to install the treads on this ladder (Reporter's Transcript, pp. 10 and 237).

3. In describing his fall, the plaintiff testified that: ". . . I stepped down, and my foot went forward and it twisted. And then I went down." (Reporter's Transcript, p. 148).

Given the existence of the foregoing evidence, it would hardly have been improper for the jury in this case to conclude that a metal ladder which had received sufficient use that its embossed metallic tread was worn away to the point of invisibility, was unreasonably slippery. Nor would it have been improper for the jury to conclude that the ladder was unreasonably slippery because it lacked anti-skid treads. And finally, it would not have been improper for the jury to conclude that the plaintiff had slipped as he was descending this ladder because of *some* slippery condition of the ladder.

Thus, if tested by the appropriate federal standard, the evidence in this case was clearly sufficient to permit the jury to conclude that the ladder was unreasonably slippery, and that the slippery condition, whatever its nature, had contributed in some way to cause the petitioner's fall, i.e., to infer that employer negligence had played "any part, even the slightest" in producing the petitioner's injuries. In drawing that conclusion and in making that inference, the jury in this case was doing nothing more than this Court has repeatedly held the juries are permitted to do in Jones Act Cases.

BLEED THROUGH

Under the *Rogers* standard, the evidentiary sufficiency of the plaintiff's case was not impaired by:

1. The fact that the evidence on causation was largely or entirely circumstantial. *Rogers v. Missouri Pacific Railroad Co., supra.* The Court of Appeal observed that there was no testimony that the worn condition of the treads or the absence of anti-skid material "rendered the ladder unsafe." (Appendix A, p. 8). The petitioner was clearly not required to produce any evidence that the ladder was "unsafe"; he was merely required to produce evidence from which the *jury* could conclude that the ladder was unreasonably unsafe.

2. The fact that the petitioner's own fault may have been a contributing factor in causing his injuries. Throughout this proceeding, it has been the respondent's position that there was no evidence which would support a jury finding that the unsafe condition of the ladder, "rather than" petitioner's own negligence, caused the petitioner's fall (Appendix A, p. 7). The Court of Appeal followed this line of reasoning. Such an "either or" approach to causation, however, is entirely inappropriate in a Jones Act case. In *Rogers v. Missouri Pacific Railroad Co., supra,* this Court specifically held:

> "It does not matter that, from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes, *including the employee's contributory negligence.*" (Emphasis added).

3. The fact that the jury's determination of proximate cause involves conjecture and speculation. This Court, in *Lavender v. Kern*, 327 U.S. 645 (1946), realistically observed that a determination on the issue of causation necessarily involves a degree of conjecture and speculation. In *Gibson v. Elgin, Joliet & Eastern Railway Co.* (7th Cir. 1957) 246 F. 2d 834, cert. den. 355 U.S. 897, it was held that a verdict in a F.E.L.A. action may be permitted to stand even though it is based *solely* on speculation,

Conclusion

By failing to apply the appropriate federal standard in testing the sufficiency of the evidence to support the judgment in favor of petitioner, the California Court of Appeal has deprived petitioner of his substantial federal rights under the Jones Act. A continuation of this practice by the California Courts will fatally destroy the uniformity of application of the Jones Act. For the foregoing reasons this petitioner for a writ of certiorari should granted.

Respectfully submitted,

EDWARD J. NILAND,
STANLEY A. IBLER, JR.,
Attorneys for Petitioner.

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I, STANLEY A. IBLER, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for WILLIAM J. DIRK, petitioner herein, hereby certify that on April 2, 1976, pursuant to Rule 33, Rules to the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on American President Lines, Ltd. by depositing such copies in the United States Post Office, 105 North First Street, San Jose, California 95113, with first-class postage pre-paid, properly addressed to the post office address of Lillick, McHose & Charles, the above-named respondent's counsel of record at Two Embarcadero Center, 26th Floor, San Francisco, California 94111.

All parties required to be served have been served.

DATED:.....

BOCCARDO, BLUM, LULL, NILAND,
TEERLINK & BELL,

By.....
STANLEY A. IBLER, JR.,

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APPENDIX A

NOT TO BE PUBLISHED
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DEC 3 1975

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED

DEC 2 1975

Court of Appeal - First App. Dist.
CLIFFORD O. PORTER, Clerk

BY _____ DEPUTY

WILLIAM J. DIRK,

Plaintiff and Respondent,

v.

AMERICAN PRESIDENT LINES, a corporation,

Defendant and Appellant.

1 Civ. No. 34681
(Sup.Ct.No. 622-956)

Plaintiff William Dirk, a merchant seaman who was employed aboard a vessel owned and operated by defendant American President Lines, Ltd., brought suit to recover damages for personal injuries allegedly sustained in the course of his employment aboard said vessel. Plaintiff based his action upon the Jones Act and the general maritime law. His complaint alleged that defendant had negligently failed to provide him with a reasonably safe place to work and that the vessel was unseaworthy.

Defendant, by way of answer, denied the charging allegations of the complaint.

The case was tried before a jury, and the following evidence was produced: Plaintiff testified that on June 22, 1969,

he was employed as a baker aboard defendant's vessel, the S. S. President Roosevelt. At 10:15 p.m. that day, plaintiff completed his duties in the ship's bakery shop and headed toward his quarters below. A ladder located some 20 to 25 yards from the bakery shop led down to A deck. The ladder was made of steel and was approximately 12 steps in length. The individual steps, which were approximately 18 inches wide, were not equipped with anti-skid strips, but did have a raised diamond-shaped pattern on them. The ladder was equipped with handrails.

Plaintiff testified that, as he started down the ladder, he was gripping both handrails. However, when he reached the fourth or fifth step, he relaxed his grip on the handrails. He then stepped down onto his left foot, and it twisted under him and slipped forward. Plaintiff testified that he tried to tighten his grip on the handrails to break his fall, but was unable to do so. He fell down the ladder, striking his right knee on the bottom step of the ladder and again on the deck below. Plaintiff then picked himself up and returned to his quarters. He discovered that there was a split in the right knee of his pants and a large spot of oil. Plaintiff testified that he had put on clean pants at approximately 4:30 that afternoon. Plaintiff admitted that he had not noticed any grease or any other accumulation of foreign matter on the ladder when he was in the process of descending it. He also admitted that he had not examined the ladder after his fall, but had just gotten up and walked away.

BLEED THROUGH

Plaintiff testified that the spot on his pants was oil and not grease, and he explained that "the oil that was on my pants was on the deck down below when I fell . . . ."

Plaintiff testified that conditions in the ship's galley were such that there were nearly always pieces of greasy meat lying on the floor. According to plaintiff, the cooks stepped on this meat and therefore had black grease on the bottoms of their shoes when they descended the ladder leading down to A deck. Plaintiff testified that there was no grating or similar device for scraping shoes located near the ladder. He also testified that the raised diamond-shaped pattern on the steps of the ladder was mostly worn away and was barely visible.

It was established that plaintiff had certain preexisting physical problems with his right knee. In 1960, he was treated for pain and swelling of both knees, and in 1967, he sprained his right knee and was unable to work for several months. Following his 1969 fall on the President Roosevelt, plaintiff was interviewed by defendant's claims adjuster, Mr. Bunch. During the course of this interview, plaintiff told Bunch that "I must have tripped because I felt my leg cave in under me causing me to fall forward on down the ladder to the deck." Plaintiff also told Bunch that he did not recall that there was anything wrong with the ladder, and he denied that he had slipped on anything. When Bunch asked plaintiff if he had noticed any grease on the ladder, plaintiff replied that he had not.

In his testimony at the trial, plaintiff admitted having told Mr. Bunch that there was nothing wrong with the ladder, and he explained that this statement was true with the exception of the fact that the diamond-shaped treads were worn. Plaintiff testified that he had not mentioned the worn condition of the treads to Bunch because Bunch had not asked him if the ladder was worn.

In a deposition taken in January 1971, plaintiff was asked whether he had ever slipped on the ladder prior to his fall in June 1969. Plaintiff replied that he had not, and he explained that on all prior occasions, he had kept both hands on the handrails, sliding them down as he descended the ladder. He then stated, "But that particular night [June 22, 1969] I just let my hand loose off the rail and I stepped down, and my foot went forward and it twisted. And then I went down." In his deposition, plaintiff was also asked whether he had hit his knee on anything during his fall. He replied that he struck it on the deck. He was then asked whether his knee struck any part of the ladder during his fall, and he replied that it had not.

Frank Ramsey, a seaman who also worked on the S. S. President Roosevelt in 1969, testified that prior to the date of plaintiff's fall, he (Ramsey) had attended several safety meetings on the ship. Ramsey stated that on several occasions there was talk at the safety meetings concerning the advisability of placing antiskid treads on the ladder where plaintiff fell.

BLEED THROUGH

Ramsey explained that there were occasions when there was an inch or an inch and a half of water in the galley, which water would overflow down the ladder. It was suggested, therefore, that antiskid material be installed in the galley, the waiter's pantry and the ladders leading down from the galley. According to Ramsey, it was agreed that the antiskid material would be installed, but the work was never done. Ramsey testified that he had seen other members of the crew slip on the ladder leading down to A deck, although none of these falls had resulted in injuries. Ramsey had also seen food and dirty dishes carried up and down the ladder.

Chief Steward Raymond Cavanaugh produced minutes from safety meetings which indicated that antiskid material had been installed in the galley and adjacent areas. However, these minutes contained no reference to any recommendation that antiskid material be installed on the ladders. Cavanaugh testified that he recalled the treads on the ladder being in good condition. He did not recall the subject of the ladder ever having been raised at a safety meeting. He was likewise unaware of any accidents having occurred on the ladder, and he had received no complaints concerning the condition of the ladder. Cavanaugh denied that food was carried up or down the ladder.

The deposition of Robert Swan, who was employed as a carpenter on the S. S. President Roosevelt, was read into evidence. Swan described the procedure on board the ship for requesting

maintenance work in crew areas, and he stated that he had never received a request for any type of work on the ladder where plaintiff fell. Swan recalled a work order involving the installation of antiskid material in the galley. From his personal observations, Swan was not aware of any ladder on the ship where replacement of the treads was needed.

At the conclusion of the trial, the jury returned a verdict in favor of plaintiff and against defendant in the amount of $100,000. Judgment on verdict was duly entered, and defendant thereafter moved for a new trial and for judgment notwithstanding the verdict. The trial court denied both motions. Defendant then filed a notice of appeal from the order denying its motions for new trial and for judgment notwithstanding the verdict.[1]

Defendant takes the position on appeal that the evidence above summarized, when viewed in the light most favorable to plaintiff, was nevertheless insufficient as a matter of law to

---

[1] The scope of review on this appeal is a narrow one. Insofar as defendant purports to appeal from the order denying its motion for new trial, said order is nonappealable and the appeal therefrom must be dismissed. (Rodriguez v. Barnett (1959) 52 Cal.2d 154, 156.) The order denying defendant's motion for judgment notwithstanding the verdict is appealable. (Code Civ. Proc., §§ 629; 904.1, subd. (d).) The sole question which can be raised on such an appeal is whether the court should have granted the motion, viz., whether, disregarding conflicts, giving plaintiff's evidence its full face value and indulging in all legitimate inferences favorable to plaintiff, it nevertheless appears from a review of the entire cause that there is no evidence upon which a judgment for plaintiff can be sustained. (Preston v. Hurtt (1961) 196 Cal.App.2d 781, 785-6.)

support a finding that plaintiff's fall was the result either of defendant's negligence or of the unseaworthy condition of the ship. Defendant asserts that in a factual situation such as that here present, it would serve no useful purpose to analyze the evidence separately in terms of negligence and unseaworthiness. Defendant correctly points out that it is rare that the circumstances of an injury will constitute negligence but not unseaworthiness. (Pope & Talbot, Inc. v. Hawn (1953) 346 U.S. 406, 418) and that in a case involving a fall allegedly resulting from a slippery condition, a jury's finding that the shipowner was negligent but that the vessel was seaworthy must be set aside as irreconcilably inconsistent. (Turner v. "The Cabins", Tanker, Inc. (D. Del. 1971) 327 F.Supp. 515.) Defendant also points out that the plaintiff's burden of proving unseaworthiness is a lesser one, since he need not establish the defendant's knowledge of the dangerous condition. (Mitchell v. Trawler Racer, Inc. (1960) 362 U.S. 539, 549.) Thus, in determining the sufficiency of the evidence in this case, the sole issue is whether defendant's fall was the result of the unsafe condition of the ladder. If the evidence supports such a finding, defendant concedes that the verdict must be upheld on a theory of unseaworthiness and that it is irrelevant whether the jury also found that defendant was negligent and had knowledge, actual or constructive, of the defective condition of the ladder. If, on the other

hand, the evidence does not support a finding that defendant's fall was the result of the unsafe condition of the ladder, defendant contends that the verdict for plaintiff cannot be upheld on either a negligence or an unseaworthiness theory. Defendant takes the position that there was no evidence which would support a finding that the unsafe condition of the ladder, rather than plaintiff's own negligence, caused plaintiff's fall.

A thorough review of the evidence fails to disclose any tenable theory upon which a jury could reasonably base a finding that plaintiff's fall was caused by the unsafe condition of the ladder on defendant's ship. Plaintiff's own testimony at the trial established that his fall occurred after he had relaxed his grip on the handrails and stepped onto his left foot in such a manner that it twisted under him and slipped forward. When interviewed by defendant's claims adjuster, plaintiff stated that he "must have tripped" and that he felt his leg "cave in under me." Plaintiff told the claims adjuster that there was nothing wrong with the ladder and he specifically denied that he had slipped on anything. In a pretrial deposition, plaintiff accounted for his fall by explaining that he had deviated from his prior pattern of holding on to the handrails and had "just let my hand loose off the rail" before stepping down. In his testimony at the trial, plaintiff admitted that he had not noticed any grease or other accumulation of foreign matter on the ladder when he was descending it. He had not examined the ladder

BLEED THROUGH

after his fall, but had merely gotten up and returned to his quarters.

Viewing the evidence in the light most favorable to plaintiff, the liability aspect of his case was based upon two facts: (1) the ladder was not equipped with antiskid material and the diamond-shaped treads on the steps of the ladder were worn; and (2) plaintiff discovered a spot of oil on his pants after his fall.

There was no testimony by plaintiff or by anyone else that the absence of antiskid material and the worn condition of the diamond-shaped treads rendered the ladder unsafe under ordinary conditions. Witness Ramsey testified only that it had been recommended at safety meetings that antiskid material be installed on the ladder to render it safe on occasions when water overflowed down the ladder from the galley. There was no evidence of any water in the galley or on the ladder at the time of plaintiff's fall.

The evidence of the oil spot on plaintiff's pants is likewise of no real significance in determining the cause of his fall. Plaintiff testified that the oil spot was located on the right knee of his pants. In his deposition, plaintiff had denied that his knee struck any part of the ladder during his fall, and he stated that he hit his knee only on the deck at the bottom of the ladder. At the trial, plaintiff testified that, in actual fact, he had struck his knee on the bottom of the ladder and

again on the deck. However, he also testified that the oil on his pants came from the deck at the bottom of the ladder. He further stated that the substance on his pants was oil and not the black grease which, according to plaintiff, accumulated on the shoes of cooks who had stepped on meat in the galley. Viewing plaintiff's testimony in the most favorable light possible, it is nevertheless apparent that the oil spot on his pants was acquired after he had already fallen several steps down the ladder. Further, there was no evidence even tending to suggest that the oil was a substance which came from the galley and which inferably could have been tracked from the galley down the ladder. Thus, the oil spot on plaintiff's pants sheds no light whatever on the cause of plaintiff's fall.

In Wiseman v. Sinclair Refining Company (2d Cir. 1961) 290 F.2d 818, the plaintiff brought suit to obtain damages for negligence and unseaworthiness, claiming to have slipped on a greasy ladder on board the defendant's vessel. The plaintiff recovered in the trial court, but the judgment was reversed by the appellate court with directions to dismiss the action. The appellate court, in so holding, stated: 'More basic ground for reversal is the absence of evidence of liability. Neither plaintiff nor any other witness testified that they ever saw grease on the stair. To be sure, plaintiff said on direct examination that the step was greasy. But on cross-examination he admitted that he did not see grease there at the time; that

BLEED THROUGH

he only saw grease on his shoe. But where that grease came from does not appear." (P. 820.)

We find that the evidence, in this instance, is considerably weaker than in the Wiseman case, since the plaintiff in that case did testify that there was grease on his shoe, which testimony at least suggests that the grease was what he slipped upon. In the instant case, plaintiff's own unequivocal testimony shows that the oil on his pants could not have been the cause of his fall because he did not come into contact with it until he had already fallen to the bottom of the ladder. Thus, the Wiseman case appears to be controlling of this case and furnishes direct authority for the proposition that the evidence produced by the plaintiff herein was insufficient as a matter of law to establish defendant's liability.

Plaintiff has made no attempt to distinguish the Wiseman case, but he does assert that Barboza v. Texaco, Inc. (1st Cir. 1970) 434 F.2d 121, bears "a remarkable factual similarity" to the instant case. We do not agree. In Barboza, it was undisputed that the plaintiff slipped on zucchini squash while descending a stairway on the defendant's vessel. Squash was found on the plaintiff's foot and was also found on two steps of the stairway. On appeal by the defendant from a judgment for the plaintiff, it was contended that the evidence was insufficient to support a finding of liability because there was no basis other than speculation for determining whether the plaintiff

had tracked the squash onto the stairs himself or whether it had been there prior to his arrival. The appellate court, in rejecting this argument, noted that the plaintiff had testified that he had cleaned his shoes with a mop 10 minutes before his fall and that he "couldn't possibly have" tracked the squash onto the stairs himself and that there was also evidence that the galley man had descended the stairs shortly before the plaintiff's fall.

The situation in the Barboza case was thus one where it was undisputed that there was a particular foreign substance on the stairs which rendered them slippery and unsafe and which caused the plaintiff's fall. There was also evidence that it was not the plaintiff, but someone else, who had caused the substance to be on the stairs. The instant case is totally dissimilar, in that there was no evidence to show that plaintiff's fall was in fact the result of any foreign substance or other unsafe condition of the ladder.

To impose liability upon defendant on the basis of the evidence disclosed by the record in this case would require one to indulge in gross speculation as to the proximate cause of plaintiff's injury. If such speculation is permitted, then it would not be unreasonable to conclude, among other possibilities, that it was plaintiff's relaxed hold on the handrails, coupled with his preexisting knee condition, rather than a defective condition in or upon the ship's ladder, which was the direct

cause of his fall. While federal case law is quite liberal in defining unseaworthiness of a vessel, we know of no authority which allows jurors to base their determination upon surmise or conjecture. In fact, they are expressly forbidden to do so.

Accordingly, we conclude that plaintiff's case falls directly within the purview of the Wiseman holding and that defendant is correct in its contention that the trial court erred in denying its motion for judgment notwithstanding the verdict.

In view of such determination, we deem it unnecessary to discuss defendant's other contentions.

The purported appeal from the order denying defendant's motion for new trial is dismissed. The order denying defendant's motion for judgment notwithstanding the verdict is reversed, with directions to the trial court to grant same and enter judgment for defendant.

Rouse, J.

WE CONCUR:

Taylor, P. J.

Kane, J.

APPENDIX B

ORIGINAL

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division TWO

FILED

DEC 1 1975

Court of Appeal - First App. Dist.
[illegible], Clerk

No. 34681

William J. Dirk,
Plaintiff and Respondent,

vs.

American President Lines, Ltd., a corporation,
Defendant and Appellant.

BY THE COURT:

The petition for rehearing in the above entitled cause is hereby denied.

Dated DEC 31 1975

P.J.

I, CLIFFORD C. PORTER, CLERK OF THE COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF THE COURT THIS 1 DAY OF DEC 1975

CLIFFORD C. PORTER, CLERK

BY [illegible] DEPUTY

FILED

JAN 28 1976
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
By

ORIGINAL

Crim. Dec
January 30, 1976

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2, Civil No. 34681

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BIRK

v.

AMERICAN PRESIDENT LINES, LTD., A CORPORATION

Respondent's petition

for hearing DENIED.

SUPREME COURT
FILED
JAN 28 1976
G. B. [illegible], Clerk

Deputy

I, CLIFFORD C. PORTER, CLERK OF THE COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

WITNESS MY HAND AND THE SEAL OF SAID COURT THIS 4th DAY OF Feb. 1976.

CLIFFORD C. PORTER, CLERK

BY: [signature], DEPUTY

WRIGHT

Chief Justice